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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST EMPIRE BANK-NEW YORK (by its successor-in-interest MANUFACTURERS & TRADERS TRUST CO. of Buffalo, New York, a New York banking corporation) and SOCIETE GENERALE, a French banking corporation,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE CORPORATION as RECEIVER OF UNITED STATES NATIONAL BANK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

When the Federal Deposit Insurance Corporation resolves a national bank insolvency by arranging a purchase and assumption of the failed bank's assets and liabilities by a sound bank, as is usually the case, thus assuring all assumed creditors full principal plus interest at contract rates, does it violate the provisions of the National Bank Act mandating equal treatment among creditors (12 U.S.C. §§ 91 and 194) if it ultimately pays improperly excluded creditors only the legal rate of interest?

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FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF UNITED STATES NATIONAL BANK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

First Empire Bank-New York, by its successor-in-interest Manufacturers & Traders Trust Co., and Societe Generale petition for a writ of certiorari to review a judgment and decision of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra* at A1-A7) is not yet reported. The district court's decision (App. B, *infra* at B1-B3) is not reported. A prior, related opinion of the Court of Appeals (App. C, *infra* at C1-C23) is reported at 572 F.2d 1361, *cert. denied,* 439 U.S. 919.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1980. (App. A at A1) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

This case involves two provisions of the National Bank Act ("NBA"):

1. 12 U.S.C. § 91 (R.S. § 5242):

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void;....

2. 12 U.S.C. § 194 (R.S. § 5236):

> From time to time,... the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims

previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.[1]

Statement

This case arises out of the second largest bank failure in American history—the 1973 collapse of United States National Bank of San Diego, California ("USNB"). On October 18, 1973, the FDIC, as Receiver of USNB ("Receiver"), implemented a purchase and assumption transaction with Crocker National Bank ("Crocker"). The only excluded creditors (other than C. Arnholt Smith, the bank's principal stockholder, and his associates) were banks holding some $91 million of USNB standby letters of credit. Petitioners belonged to the excluded class; they held five USNB letters of credit with a face value of $11.5 million. They commenced this lawsuit in December 1973, contending that respondents' treatment of their claims against the USNB receivership was unlawful under 12 U.S.C. §§ 91 and 194 and seeking the same payment that had been received by all other non-Smith related USNB

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[1] The Federal Deposit Insurance Act provides that whenever the Comptroller of the Currency appoints a receiver of a national bank "he shall appoint" the Federal Deposit Insurance Corporation ("FDIC"), 12 U.S.C. § 1821(c), and, "[n]otwithstanding any other provision of law," the FDIC as receiver is authorized to pay directly to "depositors and other creditors the net amounts available for distribution to them." 12 U.S.C. § 1821(d). Thus it is not necessary for the FDIC as receiver to pay money over to the Comptroller. Under present law, the FDIC as receiver pays dividends directly to the creditors of an insolvent bank "in conformity with the provisions of law relating to the liquidation of closed national banks," *id.*, to wit, § 194.

creditors, namely, full principal plus contract rates of interest until the date of payment.[2]

The United States District Court for the Southern District of California held that petitioners' claims were provable, but it upheld the respondents' refusal to pay them. A unanimous Ninth Circuit Court of Appeals affirmed the district court's determination that petitioners held provable claims, but the court held that respondents had violated the ratable dividend rule of 12 U.S.C. § 194 when the Receiver distributed the proceeds of the assets of USNB in such a way as to provide a 100% payment to some creditors and no payment to others. (572 F.2d at 1370-71; App. C at C18-C21). The court also decided that petitioners, to be accorded the required equal treatment among creditors, were entitled to be paid not only principal but also pre-judgment interest. (*Id.* at 1372; App. C at C21-C23)

After this Court denied certiorari, 439 U.S. 919, petitioners moved in the district court for the entry of judgment in the sum of approximately $13.2 milion. The amount sought was based on a calculation that applied the contract rates of interest stated in each letter of credit to the principal due thereon from the date that all other creditors were paid through the date of payment to petitioners.[3] The FDIC filed objections, contending that the

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[2] The Purchase and Assumption Agreement specifically committed Crocker and the FDIC to paying all assumed creditors full contract interest. Paragraph 2.3 thereof provides as follows: "All liabilities assumed under this agreement by Assuming Bank are assumed as of the Bank Closing [October 18, 1973], and Assuming Bank agrees that interest and accruals on the related obligations shall thereafter be accrued and paid by Assuming Bank in accordance with the terms of such obligations." Plaintiffs' Trial Exhibit No. 1.

[3] The computation applied the rate of interest stipulated in each letter of credit, calculated using the agreed-upon 360-day accounting year, and maintained the spread between the interest (if any) due the Receiver on compensating deposits held by petitioners as set-offs and the rate earned by petitioners on the letters of credit.

total payment should amount to $12 million.[4] It calculated the amount due via a method that eschewed contractual rates of return and relied instead on the California legal rate.[5]

The district court issued rulings (App. B at B1-B3) which upheld the FDIC's method of calculation. (*See also* App. D at D3-D4) Petitioners appealed to the Ninth Circuit. By a 2-1 vote, that court affirmed the district court's judgment, holding that "it is recognized that interest upon a claim erroneously disallowed by the receiver should be calculated at the applicable legal rate" (App. A at A4), i.e., the statutory rate at which judgments earn interest in the forum in which the federal court sits.

The dissent identified the "central problem" presented by the case as "the task of determining what is needed to put disfavored creditors on an equal footing with favored creditors." (*Id.* at A6) It pointed out that application of the legal rate "disadvantaged" petitioners because the "favored creditors were timely paid and were able to reinvest at market rates higher than the legal rate. The disfavored parties were denied the opportunity for investment at market rate." (*Id.* at A6-A7) Rather than the legal rate, the dissent concluded that a "rate of return

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[4] On December 11, 1978, the FDIC paid petitioners the amount it conceded was due them. That payment was made pursuant to a stipulation and order which provides that the FDIC will only be liable to pay petitioners interest at the rate of 7% on all sums above the amount previously paid which a court may subsequently determine should have been paid to petitioners.

[5] The FDIC deducted the set-offs as of the date of USNB's closing, thus eliminating the agreed-upon interest spread. While it computed interest on the reduced principal at the contract rates, using the 360-day accounting year, until the date each letter of credit matured, it thereafter applied a 365-day year and the California legal rate of 7%.

approximately the market rate should have been used to achieve equality." (*Id.* at A7)[6]

Reasons For Granting The Petition

1. The NBA is silent both as to the availablity of pre-judgment interest and the rate to be used in calculating such interest. *See National Bank of the Commonwealth* v. *Mechanics' Nat. Bank,* 94 U.S. 437, 439 (1877). The Court has determined, however, that excluded creditors of insolvent national banks are entitled to receive pre-judgment interest for the period between payment of dividends to all other creditors and the date they receive their payments. *Armstrong* v. *American Exchange Nat. Bank,* 133 U.S. 433 (1890); *Ticonic National Bank* v. *Sprague,* 303 U.S. 406 (1938).[7] It is now confronted with the question of what rate of interest should be applied during that period. While petitioners argued for application of the contract rates and the dissent in the court below advocated use of a market rate, the Ninth Circuit majority approved the district court's reliance upon the legal rate.

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[6] Five other lawsuits have been commenced against the FDIC contesting the treatment accorded holders of USNB standby letters of credit. Those cases are pending in the United States District Court for the Southern District of California. The FDIC computed the payments made to those plaintiffs on the same basis as used in this case. The resolution of this case will determine whether the FDIC also owes those plaintiffs additional sums. It is estimated that the other cases involve interest claims totalling $3 million.

[7] In *Armstrong* the Court ruled that an award of pre-judgment interest to a claimant who was improperly denied a ratable dividend was "necessary to put the plaintiff on an equality with the other creditors." 133 U.S. at 470. Later, in *Ticonic National Bank,* the Court noted that the question of interest should be determined by reference to the "ideal of equality" of treatment embodied in 12 U.S.C. § 194. 303 U.S. at 411.

The circuit court majority decided this important question of federal law by reference to three Depression-era cases which opted for the legal rate of interest. (App. A at A4) In so doing, the court ignored the fact that the cases it relied upon (*Douglass* v. *Thurston County*, 86 F.2d 899 (9th Cir. 1936); *Anderson* v. *General American Life Ins. Co.*, 141 F.2d 898 (6th Cir. 1944); and *Elliott* v. *First Inland Nat. Bank*, 32 F.Supp. 839 (D. Ore. 1940)) are the product of a very different time in the banking and economic history of the nation. Those cases arose out of the multitude of bank failures that occurred during the Depression. They are the progeny of a time when, because of severely depressed economic conditions, legal rates of interest *exceeded* commercial rates. Accordingly, in two of the three cases cited by the Ninth Circuit majority, the effect of applying the legal rate of interest was to give the excluded creditors a *greater* return than they would have received by application of the contract rates. (In the third case, the two rates were equal.)[8] Moreover, the cases all involved liquidations in which creditors received partial dividends from the insolvent bank's estate. Prior to this

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[8] In the *Anderson* case the contract rate was only 3% (141 F.2d at 909; *see also* the district court opinion, *sub nom. Missouri State Life Ins. Co.* v. *Keyes*, 46 F.Supp. 181, 182 (W.D. Ky. 1933)) but the legal rate was 6% (141 F.2d at 909). Similarly, in *Elliott*, the contract rate was 4% (32 F.Supp. at 839), but the legal rate was 6% (Oregon Co..piled Laws Annotated § 66-101 (1940)). In *Douglass*, the contract rate was 6% (86 F.2d at 902) as was the legal rate (*id.* at 910). One other case considers the same question, *Dunnagan* v. *Best*, 59 F.2d 795 (W.D. Tex. 1932), and opts for the legal rate. In that instance, the decision had the effect of giving the excluded creditor less because the legal rate was 6% (Vol. 15, Art. 5072, Vernon's Texas Civil Statutes Annotated (1925)) while the contract rate was 8% (59 F.2d at 796). *See also Stein* v. *Delano*, 35 F.Supp. 260 (D.N.J. 1940), *aff'd*, 121 F.2d 975 (3d Cir.), *cert. denied*, 314 U.S. 655 (1941), which opted for the legal rate in the face of arguments that a lesser amount would suffice. 121 F.2d at 980. We discuss the *Stein* case *infra* at 12.

case, no court had had occasion to consider the question of the appropriate rate of interest to be paid to excluded creditors after the occurrence of an FDIC-assisted purchase and assumption wherein all other creditors received an immediate 100% dividend plus contract rates of interest.

At issue, therefore, is an unresolved question of federal law which the Ninth Circuit disposed of by the application of inapposite authority. This Court should review the circuit court's opinion in order to address the interest rate question.

2. This Court has repeatedly emphasized that "one of the objects of the national bank system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors . . . ." *Mechanics Universal Joint Co.* v. *Culhane,* 299 U.S. 51, 55 (1936). *Accord, Third National Bank* v. *Impac Ltd., Inc.,* 432 U.S. 312, 323 (1977); *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U.S. 245, 255 (1934); *Blakey* v. *Brinson,* 286 U.S. 254, 263 (1932); *First National Bank* v. *Colby,* 21 Wall. (88 U.S.) 609 (1875). The Court's dedication to this principle is so strong that it has consistently struck down federal and state statutes that purported to create preferences for particular classes of creditors of insolvent national banks. *See Cook County National Bank* v. *United States,* 107 U.S. 445 (1883); *Davis* v. *Elmira Savings Bank,* 161 U.S. 275 (1896). *See also Jennings* v. *U.S. Fidelity & Guaranty Co.,* 294 U.S. 216 (1935).

While the Ninth Circuit's first opinion recognized and enforced the rule of equal treatment, its current holding sanctions, as the dissent points out, disparate treatment. The majority opinion unambiguously announces a rule of federal law applicable to all national bank insolvencies resolved by FDIC-assisted purchase and assumption trans-

actions. Even though assumed creditors receive an immediate 100% dividend *plus contract rates of interest,* the circuit court holds that excluded creditors are entitled to only a delayed dividend of 100% of their principal *plus "the applicable legal rate" of interest.* (App. A at A4; emphasis supplied) On its face, therefore, the Ninth Circuit's holding is in conflict with the ratable treatment mandate of 12 U.S.C. §§ 91 and 194 and with the prior decisions of this Court which command strict adherence to the "ideal of equality" of treatment among all similarly situated creditors of insolvent national banks. *Ticonic National Bank* v. *Sprague,* 303 U.S. at 411. This conflict raises an important question of federal law which warrants a definitive ruling by this Court.

3. The question presented is likely to recur with some frequency. During the past decade, 15 national banks failed, the largest number of national bank failures in any decade since World War II. Eleven of those cases (including the five largest in the nation's history) were resolved via the implementation of FDIC-assisted purchase and assumption transactions.[9] As noted in the FDIC's latest annual report, the purchase and assumption approach to resolving bank failures "has been used increasingly in recent years." FDIC 1979 Annual Report, p. 14. Moreover, in virtually every large bank failure which the FDIC has confronted, it has used the purchase and assumption method.[10]

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[9] The statistics set out in this section were derived from the FDIC Annual Reports for the years 1970-1979.

[10] Of the 24 bank failures occurring between 1934 and 1979 involving banks with deposits of $25 million or more, 22 were handled via the purchase and assumption route. *See* FDIC 1979 Annual Report, Table 124, p. 206.

The enormous increase in the size of national bank failures,[11] and the essentially exclusive use of the purchase and assumption method is well illustrated by the following comparisons: The total deposits involved in all national bank failures prior to 1970 were $207.3 *million,* of which $121.1 million were involved in a purchase and assumption. In the 1970's the total deposits held by failed national banks were $3.08 *billion,* and of that total, $3.03 billion were involved in a purchase and assumption. Thus, 98.3% of the deposits involved in national bank insolvencies during the 1970's were dealt with by purchase and assumption transactions, representing 95% of the total deposits of all failed national banks since 1934 dealt with via the purchase and assumption method.

Whenever during the last decade the FDIC, acting as receiver of an insolvent national bank, entered into a purchase and assumption transaction with a sound bank, the assumed creditors received "full protection." FDIC 1979 Annual Report, p. 15. In every relevant respect those cases replicate ours, even as regards the presence of excluded creditors. *See FDIC* v. *Freudenfeld,* 492 F.Supp. 763 (E.D. Wisc. 1980).[12] Therefore, the question

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[11] During the period 1934 to 1979, 692 banks failed (includinb both insured and non-insured institutions); they held $6,081,926,000 in deposits. Of that amount, the 81 banks that failed during the 1970's held $5,210,599,000 in deposits or 85.7% of the 46-year total. *See* FDIC 1979 Annual Report, Table 122, p. 203. The 15 national banks that failed during the 1970's held a total of $3,077,800,000 in deposits, or 50.6% of the 1934-1979 total for all banks. *Id.*

[12] In the Solicitor General's August 1978 Petition for Certiorari filed on behalf of the FDIC, seeking review of the Ninth Circuit's first decision, it was disclosed that in addition to the USNB insolvency, the "FDIC has excluded some standby letters of credit from purchase and assumption transactions concerning failed banks in New York, Ohio, and Wisconsin; the holders of these letters have filed suit against the FDIC. More than 40 other cases in the lower courts involve the FDIC's authority to exclude liabilities from purchase and assumption transactions." Petition for Certiorari, No. 78-289, p. 10.

as to what rate of interest excluded creditors should receive is certain to recur as the lawsuits resulting from the bank failures of the past decade reach the judgment stage.[13]

4. The Ninth Circuit's decision also warrants review because it conflicts with the well-established bankruptcy and equity receivership rule that in 100% dividend cases interest is available to all unsecured creditors at the contract rates. 3A *Collier on Bankruptcy* (14th Ed. 1975) ¶ 63.16, pp. 1860-61. *See also id.* at pp. 1858-59; 6/Part 2 *Collier on Bankruptcy* (14th Ed. 1978) ¶ 9.03, pp. 1576-77 1582, 1583; *Glenn on Liquidation* (1935 Ed.) § 488, p. 692. Interest at the contract rate is also available to a secured creditor if the collateral is valuable enough to provide for the payment of both principal and interest. Such is the case even if general creditors receive less than a 100% dividend and consequently are paid no interest. 3A *Collier on Bankruptcy,* ¶ 63.16, p. 1862.

Prior decisions of this Court have specifically established that secured creditors of insolvent national banks are entitled to collect contract rates of interest from the proceeds of their collateral. *See Vanston Bondholders Protective Committee* v. *Green,* 329 U.S. 156, 164-65 (1946); *Ticonic National Bank* v. *Sprague,* 303 U.S. at 411-413; *Merrill* v. *National Bank,* 173 U.S. 131 (1899).

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[13] The interest rate question is also likely to recur for another reason. As recognized by the Ninth Circuit in its first opinion, the FDIC need not include every creditor in the package of liabilities transferred to the assuming bank in a purchase and assumption, provided it "leaves sufficient assets in the receivership to allow distribution to unassumed creditors equal to that undertaken by the acquiring bank as to the creditors it has accepted," and/or the FDIC stands ready "to supplement the remaining assets should they fall short and to surrender its lien when necessary." (572 F.2d at 1371; App. C at C20) It is reasonable to expect that in the future, as in the past, the FDIC may well find it necessary to exclude certain claimants from the group of initially assumed creditors or otherwise to delay the payment of ratable dividends to certain creditors (e.g., those whose claims are disputed).

Those decisions have also suggested, without so holding, that unsecured creditors of insolvent national banks are entitled to receive accrued contractual interest in 100% dividend cases. In the *Merrill* opinion, Chief Justice Fuller noted that "after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders." 173 U.S. at 141. *Accord, Douglass* v. *Thurston County,* 86 F.2d at 909-910. *Cf. Vanston Bondholders Protective Committee* v. *Green,* 329 U.S. at 165, n.7. Moreover, in *Stein* v. *Delano, supra,* the Third Circuit specifically held in a 100% dividend case that national bank depositors would receive interest from the proceeds of the estate prior to payment of any funds to the stockholders. In reaching that conclusion, the court quotes with approval a law review article which explains that

> ". . . when the surplus is sufficient to pay in full the interest due to all the creditors, a difference in the rates provided by their contracts is not productive of any unjust inequality between them. The rights of one are in no way affected by the amount received by another. An amount equal to the principal is paid to each. Even where the surplus will not pay all the interest in full, no unjust inequality results from dividing it on the basis of different contract rates. The balance remaining due is proportioned to the compensation that each should receive for the use of his money. There is no injustice in computing the proportion of compensation to be received by each creditor on the basis of the rate of compensation for which he contracted."

121 F.2d at 978, quoting Hanson, *Effect of Insolvency Proceedings on Creditor's Right to Interest,* 32 Mich. L. Rev. 1069, 1082 (1934).[14]

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[14] The foregoing analysis provides a complete response to the Ninth Circuit's professed concern that awarding petitioners contract interest "would result in a decidedly unratable distribution as between disfavored creditors." (App. A at A3-A4)

The district court refused to apply that rule in this case because of "the fact that the FDIC is losing more than $100 million in the process of liquidation." (App. B at B1-B2) The flaw in the district court's reasoning is its failure to recognize that the very fact of a bank failure mandates a loss for FDIC (an agency created by Congress during the Depression in order to transfer the losses resulting from bank failures from bank creditors to a public insurance fund). When the FDIC enters into a purchase and assumption transaction it does so because a loss is inevitable, and it is seeking to minimize the amount. It purposely purchases bad assets or makes loans on the security of such assets, giving far more to the assuming bank or receiver than the true worth of the assets. *See* 572 F.2d at 1364; App. C at C3-C4. *See also* 12 U.S.C. §§ 1823(d) and (e). Thus, the loss experienced by the FDIC in any such case, including ours, is the inevitable result of the bank failure at issue and the performance by the Corporation of its statutory function—in our case it was the inevitable result of the Corporation's act of loaning the Receiver far more than the retained assets of the receivership were worth. To use that loss against petitioners, to compare the FDIC in its capacity as a creditor to petitioners' situation is contrary to the statutory scheme and ignores the essential distinction between a pre-insolvency creditor of USNB who lent funds prior to the bank's collapse and a post-insolvency creditor of the receivership estate who lent funds to the Receiver in lieu of paying depositors the amount of their insured claims.

Though the issue was vigorously pressed in the Ninth Circuit, the court chose to ignore it. It has nonetheless, albeit *sub silentio,* ruled out application of a rule which this and other courts had previously acknowledged as applicable in national bank insolvencies. The effect of that holding will be widespread in our era of large national bank failures resolved by FDIC-assisted purchase and assumption transactions which afford all but disfavored creditors a 100% dividend. *See supra* at 9-11.

5. An award of interest at the market rate, as advocated by the dissenting judge in the court below, is an alternative to contract rates. In this time of high interest, rapid fluctuations in rates and high mobility of funds, use of the market rate would satisfy the goals of ratable treatment and full compensation.

The use of market rates in federal court awards of pre-judgment interest is well established in admiralty, where, as in this case, the goal is "fully compensating an injured party for its losses." *Federal Barge Lines, Inc.* v. *Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980). In several recent admiralty cases which have awarded higher than statutory rates of interest, the courts have relied upon money market conditions as a basis for doing so. *See, e.g., Bunge Corporation* v. *American Commercial Barge Line Co.*, 630 F.2d 1236, 1243 (7th Cir. 1980); *Federal Barge Lines, Inc.* v. *Republic Marine, Inc.*, 616 F.2d at 373-74 (10% awarded); *Sabine Towing and Transportation Co.* v. *Zapata Ugland Drilling, Inc.*, 553 F.2d 489, 491 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977) (12% awarded based on cost of borrowing); *Sea-Land Service, Inc.* v. *Eagle Terminal Tankers, Inc.*, 443 F. Supp. 532, 534 (W.D. Wash. 1977) ("An award of 6% interest is not realistic in the money-market of today.... In addition, the award of pre-judgment interest at a rate lower than that prevailing on the money market may tend to discourage the prompt disposition of litigation because of the obvious benefit to the debtor.")

Indeed, in its role as plaintiff, the federal government has urged the application of market rates in computing interest awards. For example, in *United States* v. *M/V Gopher State*, 614 F.2d 1186 (8th Cir. 1980), the government appealed from the trial court's award of 6% pre-judgment interest based on the forum state's statutory rate. The court of appeals reversed and remanded for a determination of interest "more in keeping with the in-

terest rates prevailing at the time repairs were completed . . . ." 614 F.2d at 1190. The government likewise made the same argument in *United States* v. *M/V Zoe Colocotroni,* 602 F.2d 12, 14 (1st Cir. 1979), claiming that the forum rate was "unrealistically low" at 6% and that failure to award higher rates would amount to "a handsome reward for obstinacy." The appellate court nonetheless affirmed use of the statutory rate as a guide, although specifically noting that the trial court had discretion to exceed that rate.[15]

The Court should give plenary consideration to the dissent's contention that the rule in national bank insolvencies be the market rate of interest. Its use would result in disadvantaged or delayed creditors receiving compensation based upon the market rates both they and the favored creditors could have earned during the period of delay. This clearly serves the statutory goal of ratable treatment among all creditors. As noted by the dissent, its use would result in a desirable uniformity in national bank insolvency cases. Moreover, it would eliminate any incentive for delay or reward for obstinacy.

6. The dissenting Ninth Circuit judge correctly points out that the petitioners have been significantly disadvantaged by virtue of the result reached below. Whereas the Ninth Circuit previously ruled that petitioners were entitled to be accorded treatment "equal to that undertaken by the acquiring bank" toward the assumed creditors, so that petitioners would be restored to the same position they would have been in had their claims been

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[15] This same theme is appearing in other federal law cases. For example, non-statutory rates have recently been applied in suits under ERISA (*Employee-Teamsters Joint Council* v. *Weatherall Concrete,* 468 F. Supp. 1167, 1171 (S.D. W. Va. 1979) and the securities laws (*Gerstle* v. *Gamble-Skogmo, Inc.,* 332 F. Supp. 644, 648-49 (E.D.N.Y. 1971), *modified,* 478 F.2d 1281, 1307 (2d Cir. 1973). *Cf. Curtiss-Wright Corporation* v. *General Electric Co.,* 446 U.S. 1 (1980).

transferred to Crocker on October 18, 1973 (572 F.2d at 1371; App. C at C21), the result reached below falls more than one million dollars short of that goal.

All of the creditors whose USNB obligations were assumed by Crocker on October 18, 1973 (including creditors holding standby letters of credit with non-Smith related account parties) received 100% of principal and contract interest.[16] They enjoyed the unfettered use of their money upon maturity of their USNB obligations, and they were able to reinvest those funds and to take full advantage of market conditions, earning high rates of return. Petitioners, however, were deprived of the use of their funds for several years and are now being limited to a 7% rate for the period of delay, even though their contracts called for greater interest rates, and market conditions were such that they could have earned a greater return on their money.

The ultimate irony is not, however, the Ninth Circuit's reimposition of the concept of disparate treatment, but is the FDIC's retention of an unconscionable windfall. The FDIC had the use of petitioners' $11.5 million from October 18, 1973 through December 10, 1978. If the FDIC is now required to pay only 7% interest, it will have pocketed the difference between the rate it earned (*see* 12 U.S.C. § 1823(a)) and the 7% rate. To allow the FDIC

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[16] The assumed creditors also continued to enjoy the protection of California Civil Code § 3289, which provides: "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation." As a consequence of the Purchase and Assumption Agreement, all of USNB's former creditors, except petitioners and the similarly situated banks, became creditors of Crocker and continued to enjoy the guaranty of § 3289. If Crocker defaulted in the payment of any of the assumed obligations, § 3289 assured the receipt of full interest at the contract rate. In order to place petitioners in the same position as the assumed creditors, it is necessary that they too enjoy the benefit of § 3289.

to thus benefit from its unlawful conduct makes no sense whatever. That result is clearly contrary to the spirit of 12 U.S.C. §§ 91 and 194 and to equitable "considerations of fairness" which always operate when questions of interest are at issue. *Board of County Commissioners* v. *United States*, 308 U.S. 343, 352 (1939).

Conclusion

Because of the significance of the federal law question tendered, the conflict between the opinion below and prior decisions of this Court and the courts of appeal, and the substantial disadvantage visited upon petitioners by the holding below, review is warranted. The legal issues are timely, and they are clearly drawn so that this Court is unlikely to be aided by further appellate litigation. Accordingly, this petition for a writ of certiorari should be granted.

March 27, 1981

Respectfully submitted,

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Appendix A—United States Court of Appeals— Ninth Circuit Opinion dated 12/30/80

C.A. No. 79-3166
D.A. No. 74-468-N

Filed
Dec 30 1980
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST EMPIRE BANK-NEW YORK (by its successor-in-interest MANUFACTURERS & TRADERS TRUST Co. of Buffalo, New York, a New York banking corporation) and SOCIETE GENERALE, a French banking corporation,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE CORPORATION as RECEIVER OF UNITED STATES NATIONAL BANK.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
LELAND C. NIELSEN, DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED APRIL 14, 1980

Before: BROWNING, MERRILL and FLETCHER, Circuit Judges

MERRILL, Circuit Judge:

In an earlier appeal this court dealt with problems presented by the receivership of the United States National

Bank of San Diego (USNB) and with actions taken by the Federal Deposit Insurance Corporation (FDIC), both in its corporate capacity as insurer and as receiver of USNB. *First Empire Bank-New York* v. *Federal Deposit Insurance Corp.*, 572 F.2d 1361 (9th Cir. 1978). FDIC had entered into a purchase and assumption agreement with Crocker National Bank. Under that contract, Crocker had assumed certain obligations of USNB but had refused to assume certain other obligations in the form of standby letters of credit issued by the bank, unless FDIC, in its corporate capacity, guaranteed the obligations of the account party as an offsetting asset. FDIC refused to do this. We held that the purchase and assumption agreement amounted to a distribution to those whose claims were assumed by Crocker, and that since certain creditors were excluded from the distribution it was not ratable as required by the National Bank Act, 12 U.S.C. § 194. We remanded the case "with instructions that judgment be entered in favor of each appellant in the amount of the face value of each USNB letter of credit held by it, plus interest from the dates of maturity, less the amount of any USNB deposit held by it." *First Empire Bank-New York* v. *Federal Deposit Insurance Corp., supra,* 572 F.2d at 1372.

The district court has entered judgment for appellants pursuant to our remand. On this appeal appellants challenge in three respects the manner in which sums due them were computed by the district court.

1. *Interest Rate*

The district court held that interest accruing after the date on which the obligations matured should be calculated at California's legal rate of interest: 7% per annum.[1]

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[1] The district court held that pre-maturity interest at the contract rate properly formed a part of the creditors' claims.

Appellants dispute this holding. They contend that interest should be calculated at the contract rate so that they can receive the full benefit of their bargain with USNB. In support of this contention they point to the emphasis we placed in our earlier opinion on the need for equality of treatment between creditors if dividends are to be "ratable." They conclude that they are entitled to the same treatment as those creditors who received the benefit of their bargain when their claims were assumed, and promptly paid, by Crocker.

We must reject appellants' contention. The equality of treatment we demanded in our earlier opinion pertained to the sharing of the distribution of dividends by all holding claims against the closed bank.

In our earlier opinion we dealt with the question of interest in response to FDIC's contention that interest should not form a part of the creditors' claims. We noted that while interest, after insolvency of the bank, cannot be included in the claim against the bank, it is proper to allow interest upon an erroneously disallowed claim from the date a ratable amount was paid to other creditors. We quoted from the Supreme Court in *Ticonic National Bank* v. *Sprague,* 303 U.S. 406, 411 (1938):

> "[A] creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors."

Accordingly, on our remand we directed that interest from the date of maturity be paid, not because it was bargained for, but in the nature of damages for failure to include the creditor in distribution of a dividend.

However, the benefit-of-the-bargain rule, although appropriate in other circumstances, can have no application in the event of the failure of a national bank. With different contract rates applying to different claims, the benefit-

of-the-bargain rule would result in a decidedly unratable distribution as between disfavored creditors.

Thus, in cases dealing with bank failures under the National Bank Act, it is recognized that interest upon a claim erroneously disallowed by the receiver should be calculated at the applicable legal rate. *Douglass* v. *Thurston County,* 86 F.2d 899 (9th Cir. 1936); *Anderson* v. *General American Life Insurance Co.,* 141 F.2d 898 (6th Cir. 1944). In the latter case the court stated at page 909:

> "By unquestioned authority the appellee General American Life Insurance Company is entitled to recover from the appellant Receiver legal interest at the rate of 6% per annum upon the 67% dividend and upon the 10% dividend, respectively, on its established claim of $503,541.66, from the dates when like dividends were respectively paid to other creditors up to the date when corresponding dividends shall be paid to the appellee."

And in *Elliott* v. *First Inland National Bank of Pendleton, Or.,* 32 F.Supp. 839 (D.Ore. 1940), the court stated:

> "The authorities support the proposition contended for by the Receiver—that interest on the time and savings deposits should be computed to the date of closing at the contract rate * * * thereafter the total should bear interest at the same rate (the local statutory rate on judgments) as the demand deposits. Ratability in distribution is thus attained. The question is solely one of interpretation of the National Banking Code."

Id. We agree with the Oregon court.

We conclude that the district court correctly allowed post-maturity interest at the legal rate rather than at the contract rate.

2. *Accounting Year*

Appellants' letters of credit specified that interest should be computed not only at a specified rate but on the basis of a 360-day accounting year. In calculating the pre-maturity interest, the district court used this basis together with the specified contract rate. However, the court directed that post-maturity interest should be computed on a 365-day accounting year. Appellants contend that post-maturity interest as well as pre-maturity interest should be computed on the 360-day basis. We cannot agree.

The use of the 360-day basis was an advantage to the lender, secured by special provision of the letters of credit. Absent such a provision, interest would ordinarily be computed on the basis of the physical fact that a "year," for the purposes of interest or otherwise, is an actual year of 365 days. Appellants' contention here suffers from the same weakness as did their contention respecting interest rate. For the reasons already given, contractual provisions in this case as to interest cannot control after bank closure. The district court was not in error in holding that post-maturity interest should be computed on the basis of a 365-day accounting year.

3. *Crediting of Offsets*

Appellants held deposits of USNB which they were entitled to retain as offsets against the sums due them from USNB. The district court held that in computing interest upon the sums due to appellants, the USNB deposits should be offset (and the claims against USNB reduced accordingly) as of the date of bank closure, October 18, 1973. Appellants contend that the offsets should be credited as of the date appellants ultimately received payment following our remand. We cannot agree. This would, in effect, allow appellants interest for the period from bank closure

to payment of their claims on the very deposits of USNB which they had ordinary use of throughout this time.

Where the debt of a closed bank is offset against that bank's deposit in another bank, only the balance of deposit over setoff is considered an asset of the receivership. *Scott* v. *Armstrong,* 146 U.S. 499, 510 (1892); *Federal Deposit Insurance Corp.* v. *Mademoiselle of California,* 379 F.2d 660, 663 (9th Cir. 1967). The rights of the parties become fixed as of the date of insolvency. *Scott* v. *Armstrong, supra,* 146 U.S. at 510.

As of that date, then, appellants' rights to the USNB deposits became fixed, and the receiver took no part of those deposits as assets. Accordingly, as of that date the debt of USNB on its letters of credit was reduced by the amount of its deposits.

We conclude that the district court correctly ruled that the deposits should be offset as of October 18, 1973.

Judgment affirmed.

Filed

Dec 30 1980
Richard H. Deane
Clerk, U.S. Court of Appeals

First Empire Bank-New York, Etc.,
Et Al. v. Federal Deposit Insurance
Corporation, Etc., No. 79-3166

Fletcher, Circuit Judge, dissenting:

I respectfully dissent. The central problem presented by this appeal is the task of determining what is needed to put disfavored creditors on an equal footing with favored creditors. The favored creditors were timely paid and were able to reinvest at market rates higher than the

legal rate. The disfavored parties were denied the opportunity for investment at the market rate. The appellants have been disadvantaged by the use of the legal rate. A rate of return approximating the market rate should have been used to achieve equality.

The majority argues that giving appellants the benefit of their bargain would result in unratable distribution among disfavored creditors, because different contract rates apply to different claims. But a decision giving disfavored creditors the approximate market rate would not be based on contract, but rather on the equitable principle of according disfavored creditors equal treatment with favored creditors. Thus, a decision for appellants would not entail awarding the specific contract rates specified in each instrument, but rather would involve determining market rate during the period of wrongful withholding. The rate, once determined, would be applicable to all wrongfully withheld funds.

I would remand for a determination of the rate of return that would have been earned had the appellants' funds not been wrongfully withheld and for award of interest based thereon.

Appendix B—February 15 and 23, 1979 Letter Decisions of the United States District Court for the Southern District of California

UNITED STATE DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

San Diego, California 92189

February 15, 1979

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Re: *First Empire Bank-New York, et al.* v. *FDIC*
Civil No. 74-468-N

Gentlemen:

I have reviewed this matter at length, and I am not satisfied that the question of the interest rate after maturity was decided by the Court of Appeals.

I am further of the opinion that this case should not be treated as a solvent insolvency, having in mind the fact

that the FDIC is losing more than $100 million in the process of liquidation.

Therefore, the judgment that I will sign should include the following:

1. Interest at the legal rate after the respective dates of maturity;
2. The offsets as of the date of bank closing;
3. Add First Empire's one day's interest;
4. Costs are allowed to the banks; and
5. 365-day year approved.

I assume that you gentlemen can now agree on the form the judgment should take, and I ask you to forward it to me for signature on March 1, 1979, so that the appeal process can be started again.

Sincerely yours,

/s/ LELAND C. NIELSEN
Leland C. Nielsen

Appendix B

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
San Diego, California 92189
February 23, 1979

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Re: *First Empire Bank-New York, et al.* v. *FDIC*
Civil No. 74-468-N; Your File: SCGS 400

Gentlemen:

This will acknowledeg receipt of Mr. Proudfoot's letter of February 22, 1979 concerning the set-off problem in the above case.

I am sorry that I left this matter open, as it was my intention to rule, and I now do so rule, that the set-off should be against the obligation with the earliest maturity date, whatever that obligation may be.

Sincerely yours,

/s/ LELAND C. NIELSEN
Leland C. Nielsen

Appendix C—United States Court of Appeals—Ninth Circuit Opinion dated 4/6/78

FIRST EMPIRE BANK-NEW YORK (by its successor-in-interest Manufacturers & Traders Trust Co. of Buffalo, New York, a New York Banking Corporation), and Societe Generale, a French Banking Corporation,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and Federal Deposit Insurance Corporation as Receiver of United States National Bank,

Defendants-Appellees.

FEDERAL DEPOSIT INSURANCE CORPORATION and Federal Deposit Insurance Corporation as Receiver of United States National Bank,

Counterclaimants-Cross-Appellants,

v.

FIRST EMPIRE BANK-NEW YORK and Societe Generale,

Counterdefendants-Cross-Appellees.

Nos. 77-2090 and 77-2147.

United States Court of Appeals,
Ninth Circuit.

April 6, 1978.

As Amended April 10, 1978.

Appeal from the United States District Court for the Southern District of California.

Before BROWNING and MERRILL, Circuit Judges and HARPER,* District Judge.

* Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

Appendix C

MERRILL, Circuit Judge:

This case arises out of the insolvency and receivership of the United States National Bank of San Diego (USNB). The Federal Deposit Insurance Corporation (FDIC), as Receiver, entered into an agreemnt with Crocker National Bank for purchase by Crocker of selected assets of USNB and assumption by Crocker of certain of the bank's obligations, including deposits. This suit was brought by creditors of USNB whose claims had not been assumed by Crocker. They contend that Crocker's assumption, carrying with it assurance of payment in full of the claims assumed, amounted to a distribution by the Receiver in which the plaintiffs were entitled by law to share ratably. Accordingly they seek to recover from the FDIC the amount of their claims in full. They here appeal from judgment rendered by the district court in favor of the FDIC.

Appellants' claims arise out of standby letters of credit issued by USNB in connection with loans made by appellants to customers of USNB. The FDIC contends that these claims were contingent, and were not debts of USNB at the time of its insolvency or at the time it was placed in receivership. The FDIC contends that for that reason the claims were not provable in the receivership. It cross appeals from judgment of the district court holding the claims to be provable.

The facts bearing on the appeal and cross appeal will be more fully discussed below.

I. *FACTS*

A. *The FDIC and Insolvent Banks*

The FDIC, under the Federal Deposit Insurance Act (FDIA), is given the duty of insuring to $40,000 each deposit made in national banks that are members of the

Federal Reserve System, 12 U.S.C. §§ 1811, 1813(m), 1821(a), (f). From assessments paid by the insured banks an insurance fund has been created, 12 U.S.C. § 1821(a), from which the FDIC meets its responsibilities as insurer. In this respect, § 1821(f) provides in part:

> "Whenever an insured bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible * * * either (1) by cash or (2) by making available to each depositor a transferred deposit in a new bank in the same community or in another insured bank in an amount equal to the insured deposit of such depositor."

It is the Comptroller of the Currency who, under the National Bank Act, is empowered to place a national bank in receivership. This he may do whenever he "shall become satisfied of the insolvency" of a bank. 12 U.S.C. § 191. Since enactment of the FDIA the receiver appointed by the Comptroller for national banks must be the FDIC. 12 U.S.C. § 1821(c).

This places the FDIC in the unusual position of acting in two capacities with respect to national banks closed by the Comptroller: in its corporate capacity, as insurer of deposits (in which respect we, as does the FDIA, shall refer to the FDIC as "the Corporation"), and in its capacity as receiver (in which respect we shall refer to it as "the Receiver"). This duality requires the FDIC frequently to deal with itself, e. g., to lend or sell to itself. The prayer of the complaint in this case seeks to require the FDIC as the Corporation to stand good for acts of the FDIC as the Receiver.

Under the FDIA the Corporation, through its board of directors, is authorized to take action to assist a failing bank with the hope that it may be able to avert the bank's

closure and the drastic economic effect that closure might have on the community served by the bank. 12 U.S.C. § 1823(c) and (e). One form of relief often resorted to for this purpose is the purchase and assumption agreement. By such an agreement the Corporation encourages the failing bank to agree to a takeover of its business by a sound bank. This involves an assumption by the acquiring bank of the failing bank's deposit and commercial obligations and a purchase of its assets. Where the assets are found to be less in value than the outstanding obligations, the Corporation is authorized by the FDIA to lend to the failing bank such a sum of money, to be passed on to the acquiring bank, as would bring the assumption and purchase into balance. 12 U.S.C. § 1823(e). The Corporation may take a lien on any assets remaining in the receivership to secure its loan. *Id.*

The Corporation realistically recognizes that it may not come out in the black on such a transaction. However, the question faced by the Corporation's board of directors is whether the arrangement is likely to be less costly than the bank's closure, which otherwise is the probable result with the expense to the Corporation of compensating the insured depositors which would necessarily follow. 12 U.S.C. § 1823(e); *see* Bransilver, *Failing Banks: FDIC's Options and Constraints,* 27 Ad.L.Rev. 327 (1975).

The purchase and assumption agreement also can be resorted to by a bank already failed and in receivership, in which case the Corporation deals not with the failing bank but with itself as Receiver. This is what occurred in the case of USNB.

B. *The Insolvency of USNB*

In August, 1973, the Comptroller advised the FDIC that USNB was in poor financial condition and might have to be closed. The FDIC was provided with examination re-

ports of USNB and other financial information available through the Comptroller's office. After analyzing the financial information, and information regarding the control of USNB, the FDIC decided that it had two relevant alternatives under the Act: (1) it could simply wait until USNB was closed by the Comptroller, and then pay the insured depositors up to the then $20,000 statutory limit and liquidate the bank; or (2) it could attempt to find a bank to purchase USNB's assets and assume its liabilities.

The consequences of liquidation were awesome. All of USNB's sixty-two offices, located throughout five southern California counties, would have to be closed and the value of uninterrupted operation of the offices would be lost. All checks drawn on USNB accounts would have to be dishonored, causing harm not only to the account holders but also to those persons to whom the account holders had written checks. The accounts of over 300,000 depositors in USNB would have to be held in suspense for a time long enough to permit the FDIC to compile records, offset the deposits with the liabilities, 12 U.S.C. § 1813(m), and pay the insurance, 12 U.S.C. § 1821(f). Insured depositors would receive only a maximum of $20,000, and a large percentage of the deposits were over that amount. Depositors and creditors would then receive only distributions from the liquidation of USNB's assets over a lengthy period of years. USNB had approximately one billion, two hundred and fifty million dollars in book values of assets and liabilities. It had deposits of $930 million. It had a trust department with assets under management of approximately $156 million. It had 344,000 separate deposit accounts. Approximately $300 million of those deposits were not insured. Innumerable legitimate borrowers were relying on USNB as a continuing source of credit to finance their businesses.

Faced with these consequences, the Board of Directors of the FDIC decided to attempt to find another bank to

participate in a purchase and assumption transaction on such terms as would reduce the risk of loss to the Corporation.

It was first necessary to formulate the transaction in such a manner as would prove attractive to interested banks, so that competitive bidding among such banks would minimize the losses of the FDIC. To this end representatives of qualified and interested banks were invited to join with the Corporation is a discussion designed to fix the conditions of a purchase and assumption agreement. It became immediately apparent that certain assets and liabilities of USNB were not readily acceptable to the banks. These were assets and liabilities connected with the bank's controlling shareholder, C. Arnholt Smith, and certain USNB shareholders and companies associated with him. The banking transactions of the members of this group, referred to by the FDIC as the "Designated Group," were regarded as suspect. Many interested persons attributed USNB's failure in large part either to mismanagement by the Designated Group or to their misuse of official power for personal gain, and charges were then under investigation by the Securities and Exchange Commission and the Internal Revenue Service. The members of the Designated Group individually were substantially indebted to USNB and the bank had issued standby letters of credit on their behalf to other banks that had lent money to group members. The consensus of the banks consulted by the Corporation was that the financial status of the Designated Group members was such that their obligations to USNB were of questionable value as assets, and that the assumption of liability on the standby letters of credit presented an unacceptable banking risk. Accordingly, the banks rejected such obligations as purchasable assets unless the Corporation would guarantee their value; they refused to assume the letters of credit as obligations unless in each case they had from the Corporation a guar-

antee of the obligation of the account party to the creditor bank as an offsetting asset.

The Corporation, faced with this ultimatum, refused to guarantee the value of these obligations.[1] It did not question the legal enforceability of the letters against USNB. However, it did not regard this as the controlling consideration. Instead it focused on the desirability of permitting the account parties to have their debts to the creditor banks paid out of the Corporation's jealously guarded deposit insurance fund. It felt that by guaranteeing the letters of credit it would be using the deposit insurance fund to make good "tainted" transactions of the Designated Group. Consequently, the purchase and assumption agreement as ultimately formulated did not include as purchased assets the obligations of members of the Designated Group or, as assumed obligations, the standby letters of credit issued to creditors of the group members. The transaction thus formulated was offered to the banks for competitive bid.

On October 18, 1973, USNB was closed by the Comptroller and the FDIC was appointed Receiver. Crocker National Bank, bidding $89.5 million for the value of USNB as a going concern, emerged as the acquiring bank and the following morning all USNB facilities, except its Nassau, Bahamas office, opened as branches of Crocker National Bank.

To implement the purchase and assumption agreement the Corporation lent to the Receiver the sum of $128,780,000 representing the difference between the amount of obligations assumed by Crocker and the value of the assets purchased, less the premium paid. To secure this loan the Corporation took a lien, prior to the claims

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[1] The Corporation is authorized to make such a guarantee under 12 U.S.C. § 1823(e), which provides that "the Corporation * * * may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank."

of the remaining creditors of the receivership, on the unpurchased assets remaining in the receivership. The sum so lent was passed to Crocker by the Receiver along with the purchased assets.

II. *CROSS APPEAL OF FDIC*

The FDIC has cross appealed from the rejection of its counterclaim against appellants and from the holding that appellants' claims were provable against the receivership estate. We consider this issue first because if the FDIC prevails and the letters are held not to be provable, appellants are without standing to advance the contentions they make in their appeal.

When USNB closed, the Receiver made demands upon appellants for deposits of USNB held by the appellant banks. Appellants refused to meet the Receiver's demands and retained the deposits to offset them against the amounts owed to them by USNB on the standby letters of credit. FDIC filed a counterclaim in this action for the return of the deposits. The district court, holding the letters of credit to be provable, allowed appellants to set off their obligations against the amounts due on the letters of credit and rejected the counterclaim. The Receiver contends that this was error. It seeks not only to avoid liability on the letters of credit but also to recover from appellants the sums owed to USNB on the offset claims.

A. *Nature of Letters of Credit*

Preliminarily a word should be said with respect to the nature of the standby letter of credit—the commercial instrument upon which appellants' claims are based.

The Receiver has acknowledged that some letters of credit issued by USNB did create provable claims and included these letters in the obligations assumed by Crocker in the purchase and assumption agreement. These were

primarily traditional or commercial letters of credit.[2] This type of instrument developed as a means of facilitating international trade between distant buyers and sellers not commercially acquainted with each other.

> "Stripped to its essentials, the transaction runs as follows: the buyer arranges for a bank—whose credit the seller will accept—to issue a letter of credit in which the bank agrees to pay drafts drawn on it by the seller if, but only if, such drafts are accompanied by specified documents, such as bills of lading or air freight receipts, representing title to the goods that are the subject matter of the transaction between buyer and seller. The bank undertakes this obligation for a specified period of time."

Verkuil, *Bank Solvency and Guaranty Letters of Credit,* 25 Stan.L.Rev. 716, 718, (1973) (hereinafter "Verkuil").

This letter of credit creates an absolute, independent obligation and payment must be made upon presentation of the proper documents regardless of any dispute between the buyer and seller concerning their agreement, such as a dispute over the quality of the goods delivered. *See,* Battaile, *Guaranty Letters of Credit: Problems and Possibilities,* 16 Ariz.L.Rev. 823, 825 (1974) (hereinafter "Battaile"); *Association de Azucareros de Guatemala* v. *United States Nat'l Bank of Oregon,* 423 F.2d 638, 641 (9th Cir. 1970).

In recent years instruments operating as letters of credit (in that they operate to create an absolute obligation upon presentation of specified documents) and termed "standby"

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[2] Letters of credit of this type were the subject of an earlier action against the Receiver in the USNB receivership that ultimately reached this court. *International Westminster Bank, Ltd. v. FDIC,* 509 F.2d 641 (9th Cir. 1975). The questions presented by this appeal were not reached in that case which was concerned only with whether the complaint adequately alleged equity jurisdiction to justify the injunctive and declaratory relief sought. 509 F.2d at 644-45.

to distinguish them from the traditional letters of credit have been used as security devices in a variety of contexts outside the traditional area of the international sale of goods. They have been used to insure construction loans as quasi-performance bonds, to support the issuance of commercial paper and to secure the performance of purely monetary obligations such as those involved in this case. See *Battaile, supra* at 822-26; *Verkuil, supra* at 717, 721-22. Standby letters are convenient and inexpensive and are being adapted to many uses at this time. See *Verkuil, supra* at 717. The principal difference between the traditional letter of credit and these newer standby letters is that "whereas in the classical setting, the letter of credit contemplates payment upon performance, 'the standby credit,' * * * 'contemplates payment upon failure to perform.' " Katskee, *The Standby Letter of Credit Debate—the Case for Congressional Resolution,* 92 Banking L.J. 697, 699 (1975) (hereinafter "Katskee").

This has created an awkward situation for national banks, since the standby letter of credit possesses more of the characteristics of a guarantee and national banks are not authorized to enter into guarantees. *See* Katskee, *supra* at 712-14; Harfield, *The Standby Letter of Credit Debate,* 94 Banking L.J. 293, 301-03 (1977). No contention is made here, however, that issuance of the letters of credit in question was ultra vires. The Receiver has not asserted that defense and the Comptroller appears to have chosen instead to recognize the widespread bank use and commercial usefulness of the instrument and to attempt, by regulation, to eliminate the abuses which the failure of USNB has demonstrated can result from unregulated and excessive use. FDIC Reply Brief at 5-6; *see, e. g.,* 12 C.F.R. § 7.7016 (1977).

B. *Provability of Standby Letters of Credit*

The Receiver contends, nevertheless, that standby letters of credit, whether ultra vires or not, are not

provable in a national bank receivership, since, it asserts, claims against the receiver of a national bank are not provable if they were contingent on the date of the bank's insolvency. Although the case law is quite limited, where commentators have made such statements of the law, *e. g.*, 9 C.J.S. *Banks and Banking* § 755, they are found to rest on cases involving a lessor of property leased to the bank who is asserting a claim against the receiver to recover liquidated damages for loss of future rent.

Kennedy v. Boston-Continental Nat'l Bank, 84 F.2d 592 (1st Cir. 1936), *cert. dismissed,* 300 U.S. 684, 57 S.Ct. 667, 81 L.Ed. 887 (1937), was such a case. There the lessor, following default by the national bank lessee, sought to exercise an option given him by the lease to obtain as liquidated damages the difference between the fair rental value of the property for the balance of the lease and the rental provided by the lease. The court held the claim not provable, relying on contract principles which reasoned that exercise of the option by the lessor created a new contract which came into being at the time of re-entry by the lessor. This court has followed *Kennedy* in a case also dealing with an exercise of the option to obtain liquidated damages for loss of future rent, *Argonaut Savings and Loan Ass'n v. FDIC,* 392 F.2d 195, 197 (9th Cir.), *cert. denied,* 393 U.S. 839, 89 S.Ct. 116, 21 L.Ed.2d 110 (1968). *Accord, FDIC v. Grella,* 553 F.2d 258, 262 (2d Cir. 1977).

Although these cases use broad language, indicating that the bank's liability on any claim must have accrued and be unconditionally fixed at the date of insolvency, they are, by virtue of their dependence on the "new contract" principle, distinguishable from cases not dealing with lease options exercised after insolvency. The claims here are based on letters of credit that were in existence before insolvency and are not dependent on any new contractual obligations arising later.

We conclude that the holdings of *Kennedy* and for future rent in bankruptcy were handled in a manner different from that by which other contingent obligations were handled. Although contingent contract liabilities were provable in bankruptcy, "the courts stopped short of extending the same liberality of view to claims based on leases." 3A Collier on Bankruptcy § 63.32[3] at 1927. This "remnant of medieval theory" is the basis for the statement in *Kennedy* that exercise of the right to re-entry amounted to creation of a new contract arising after insolvency. *Id.* at 1927-28. Shortly after the decision in *Kennedy,* the bankruptcy rules were liberalized to allow proof of a landlord's claim, although leases remained (and still remain) in a category apart from other contract claims, even in the present bankruptcy rules. *See id.* at § 63.31[1] at 1915-16, § 63.32[5] at 1931-32; 11 U.S.C. § 103(a)(9).

The dissenting judge in *Kennedy* noted that the allowance of the claim "depends on whether the equity rule or bankruptcy rule of provability should be followed" in a national bank's receivership. 84 F.2d at 598. His statement and the cases cited in the opinion indicate that the majority was relying on the now outdated bankruptcy rules in reaching its decision that the claims were not provable.

We conclude that the holdings of *Kennedy* and *Argonaut* should be limited to cases involving leases and loss of future rent and should not be extended to other contingent obligations. To follow those cases here would amount to extending into new areas a rule that now appears to be outmoded, based as it is on a bankruptcy rule that today has been repealed in favor of the contrary equity rule.

Although the authority against the provability of these letters is thus distinguishable, there is little positive authority to support a holding that they are provable in

national bank receiverships. There is authority holding such claims provable in general equity receiverships and in bankruptcy, as we shall discuss, but the only case dealing with the question in the context of national bank receiverships is *Pinckney v. Wylie,* 86 F.2d 541 (5th Cir. 1936). There a claim based on a bank's obligation as a surety for another's debt was asserted against a receiver of a national bank. The principal issue was whether the claimant was entitled to a ratable distribution based on the full amount of the debt or on the amount of the debt after crediting the proceeds from the sale of the security for the loan. 86 F.2d at 542. In deciding the amount of the claim, the court necessarily recognized that a claim based on a bank's obligation as surety or guarantor is provable, although it did not discuss the issue.

The result in *Pinckney* is consistent with the bankruptcy rules and equitable receivership principles governing the provability of contingent claims. Claims based on surety or guarantee obligations of a bankrupt are clearly provable as contingent contract obligations, 11 U.S.C. § 103(a)(8). 3A Collier on Bankruptcy, § 63.19 at 1876. Even before the bankruptcy statute was amended to specifically state that contingent contract claims are provable, courts held suretyship and guarantee claims provable, stating "[e]ven though not due until after the year allowed for proof of claims, if proved in time, such a claim may be liquidated as are other unmatured claims." *Maynard v. Elliott,* 283 U.S. 273, 279, 51 S.Ct. 390, 392, 75 L.Ed. 1028 (1931) (and see cases cited therein).

This bankruptcy rule of provability seems consistent with the principles governing equitable receiverships. Under equitable principles the court must consider:

> "* * * on the one hand, the substantial right of all creditors to share in their debtor's property, and, on

> the other, the necessity for expeditious administration and, giving due consideration to both, must make rules which are practicable as well as equitable."

Penn. Steel Co. v. New York City Ry. Co., 198 F. 721, 738 (2d Cir. 1912). The court in *Penn Steel* divided all claims into three classes:

> "(1) Claims which at the commencement of proceedings furnish a present cause of action;
>
> (2) Claims which at that time are certain but which are not matured:
>
> (3) Claims which are contingent."

Id. at 738. The first two classes are clearly provable but the third class of contingent claims must be divided into two subclasses:

> "(1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estates;
>
> (2) Claims which are so uncertain that their worth cannot be so ascertained."

Id. at 739—40. The latter class cannot be proved, but the claims in the former class are provable. *Id.*

The court in *Penn.* Steel found no equitable reason why the time of appointment of the receiver should determine the provability of claims, and held that:

> "Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. *But there is*

> *no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period."*

Id. at 741—42 (emphasis supplied). We agree with that statement.

The claims at issue here would be considered provable under these equitable principles because the liability on the standby letters of credit was absolute and certain in amount when this suit was filed against the Receiver. By that time, the principals had defaulted on the primary loan obligations. The claims against the Receiver were made in a timely manner, well before any distribution of the assets of the receivership, other than the distribution made through the purchase and assumption agreement.

Finally we note that the Receiver seems already to have acted upon the assumption that standby letters of credit are, in principle, provable. Some such instruments were actually assumed by Crocker with FDIC approval, and thus those creditors were assured payment in full. These were letters where Crocker was willing to accept the obligation of the account party to the creditor bank as an offsetting asset. Thus, it was not the "taint" of membership in the Designated Group that rendered the letters of appellants unacceptable to Crocker. It was the fact that the obligation was certain to accrue. It was in such cases that Crocker insisted upon the FDIC's guarantee.

We conclude that the claims of appellants were provable in face amount in the receivership.

III. *APPEAL OF FIRST EMPIRE BANK AND SOCIETE GENERALE*

A. *Ratable Distribution Under the NBA*

Appellants contend that the purchase and assumption agreement amounted to a preference of the creditors whose

obligations were assumed, contrary to the provisions of the National Banking Act (NBA), 12 U.S.C. § 91, which provides in part: "[A]ll payments of money * * * made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in a manner prescribed by this chapter, or with a view to the preference of one creditor to another * * * shall be utterly null and void * * *."

Appellants further contend that the purchase and assumption agreement amounted to a distribution to those whose claims were assumed by Crocker, and that such distribution was not "ratable" as required by the NBA, 12 U.S.C. § 194, which reads in part as follows:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a *ratable dividend* of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction * * *." (emphasis supplied).

Appellants contend that under the FDIA, §§ 91 and 194 of the NBA apply to the FDIC as Receiver. Section 1821(d) of the FDIA provides in part:

> "Nothwithstanding any other provision of law, it shall be the duty of the Corporation as such receiver * * * to wind up the affairs of such closed bank *in conformity with the provisions of law relating to the liquidation of closed national banks,* except as herein otherwise provided." (emphasis supplied).

The Receiver contends that § 91 does not apply to banks in receivership, but only to preclosure transactions.

It contends that § 194 does not apply to it[3] and that § 1821(d) excuses it from the provisions of § 194 when it is engaged in assisting in the takeover of a closed bank. It points out that the language of § 1821(d) (on which appellants rely as applying the NBA to the Receiver) contains an exception: "except as herein otherwise provided." As provision to the contrary, the Receiver relies on § 1823(e), which explicity authorizes the Corporation to make loans implementing purchase and assumption agreements and which provides in part:

> "Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and * * * will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, *upon such terms and conditions as it may determine,* make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors * * * Any insured national bank or District bank, or the Corporation as receiver thereof, is authorized to contract

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[3] The FDIC also suggests that since this was not the ordinary kind of distribution of assets in a receivership but a method of satisfying claims which is expressly authorized by the FDIA, the NBA requirement of ratable distribution should not apply. It contends that only those few assets remaining in the receivership are subject to the ratable distribution requirement. We cannot agree. It is the proceeds of a purchase of receivership assets that must be ratably distributed under § 194. Here receivership assets (including the cash borrowed from the Corporation) were sold in exchange for Crocker's assumption of debts. That assumption, then, as proceeds of the sale, constitutes a distribution of assets which must give ratable recognition to the rights of creditors of the receivership. *Ex parte Moore,* 6 F.2d 905, 909 (E.D.S.C. 1925); *see Gockstetter* v. *Williams,* 9 F.2d 354 (9th Cir. 1925).

> for such sales or loans and to pledge any assets of the bank to secure such loans." (emphasis supplied).

The FDIC contends that under this language, when engaged as the Corporation or as Receiver, in accomplishing a takeover by a purchase and assumption agreement, it is authorized to act upon such terms and conditions as it may determine without any restriction such as is imposed by § 91 or 194. It concedes that it must act "reasonably." It contends that in rejecting the claims of banks that were so unwise as to extend credit to members of the Designated Group on standby letters of credit issued by USNB, and in refusing to subject its deposit insurance fund to payment of sums owed by members of that group, it was acting reasonably.

The district court agreed that the FDIC had acted reasonably and held that the purchase and assumption agreement did not violate § 91 and § 194 of the NBA. No relevant authority has been cited to us and we have found none. Since passage of the FDIA very few national banks have failed, due, without doubt, to the efficient operations of the Comptroller and the FDIC. Court-made law is, accordingly, sparse. However, we are unable to accept the contentions of the FDIC.

In our judgment § 1823(e) cannot be read to excuse the FDIC as the Receiver from complying with the provisions of the NBA. The clause emphasized, upon which the Receiver relies, refers to the FDIC in its corporate capacity. The terms and conditions it has reference to are those conditions of loans and sales that would, in the judgment of the board of directors, qualify the agreement as action that would "reduce the risk [of loss] or avert a threatened loss to the Corporation." The FDIC points to the final sentence of the first paragraph of § 1823(e), set forth above, as indicating that the sub-

section has the Receiver in mind throughout and that the emphasized clause thus should apply to acts of the Receiver. We do not so read it. That sentence serves to enable closed or failing banks to contract with the Corporation and includes in its enablement the FDIC as Receiver of such banks. Thus the Receiver is taken note of only in so far as to recognize that is can contract with the Corporation. It is not, however, excused from behaving like a receiver when it does so act.

The FDIA did not create the concept of a purchase and assumption agreement. Before the FDIC was created, receivers of insolvent banks had entered into purchase and assumption agreements under the provisions of the NBA authorizing receivers to deal with receivership assets: 12 U.S.C. §§ 192, 194. *See, Gockstetter v. Williams,* 9 F.2d 354, 355-56 (9th Cir. 1925); *Ex parte Moore,* 6 F.2d 905, 906-07 (E.D.S.C. 1925); *Hulse v. Argetsinger,* 18 F.2d 944 (2d Cir. 1927). Congress in enacting the FDIA thus noted a pre-existing practice. We find nothing to suggest that in doing so Congress intended the FDIC to be free from the requirements of § 91 and § 194 by which prior receivers had been bound in the formulating and execution of agreements.

To accede to the FDIC's contentions would seriously undermine the policy firmly set forth in § 91 that some creditors are not to be preferred over others, and of § 194 that when distributions are made they shall be ratably made. Under its interpretation of the statutes, the FDIC could (subject only to its concession that it must act "reasonably," but without any apparent applicable standard), pick and choose which creditors should be preferred, or permit the acquiring bank to pick and choose.

In this case the extraordinary extent of the lack of equal treatment is emphasized by the fact that the un-

assumed creditors, left with only a claim against the undesirable assets of USNB remaining in the receivership, do not even have that questionable source of recovery unimpaired. They are subordinated to the lien of the Corporation to secure its loan of money to the Receiver, all of which went to Crocker to make possible the advantage to the assumed creditors. This lien would without doubt consume in full the remaining asset, leaving the unassumed creditors without any recovery whatsoever. Thus, even as to the remaining assets the assumed creditors would seem, indirectly, to have got there first and to have cut the remaining creditors out.

In our judgment it could not have been the congressional intent, upon balance, to have fiscal integrity of the deposit insurance fund (which can be adequately protected by other more equitable means) outweigh the policy of equitable and ratable payment of creditors in this manner and to permit the FDIC, whenever it felt its action to be reasonable and to serve to protect the deposit insurance fund against loss, to prefer some creditors over others—paying some in full while others received little or nothing.

This is not to say that every purchase and assumption agreement must include every creditor in order to be valid. If the purchase leaves sufficient assets in the receivership to allow distribution to unassumed creditors equal to that undertaken by the acquiring bank as to the creditors it has accepted, distribution still could be ratable. *See White v. Knox,* 111 U.S. 784, 785, 4 S.Ct. 686, 28 L.Ed. 603 (1884). The FDIC may prefer to take this chance. It must, however, stand ready to render the distribution ratable—to supplement the remaining assets should they fall short and to surrender its lien when necessary.

We conclude that the responsibility lies on the FDIC under § 194 to compensate appellants for its failure as Receiver to make distributions ratably. Had it insisted that these appellants be included in the purchase and assumption agreement as creditors with claims assumed by Crocker, as it should have done, it would then have had to satisfy Crocker by adding to the amount borrowed from the Corporation and paid to Crocker the full amount of the claims. That sum appellants are now entitled to receive from the FDIC.

B. *Interest*

The question here is whether appellants should recover interest upon their claims. The FDIC contends that to allow recovery of interest would be to permit increase of the claims over their amounts at the time of receivership. It relies on *White v. Knox,* 111 U.S. 784, 4 S.Ct. 686, 28 L.Ed. 603 (1884). In that case a creditor recovered a judgment against a national bank after the bank was declared insolvent. The judgment included the amount of his claim with interest added to the date of judgment. The claimant sought a ratable distribution on the full amount of the judgment including interest, but the Comptroller refused to recognize interest added between the insolvency and the judgment and paid a ratable dividend only on the amount of the claim as of the date of insolvency. 111 U.S. at 785, 4 S.Ct. 686. The Supreme Court agreed with the Comptroller, holding that the claimant was only entitled to a ratable distribution based on the value of the claim on the date of insolvency, "because the dividends to the other creditors had been calculated in that way, and all he was entitled to was a share in the proceeds of the assets equal to what had been distributed to others during the pendency of his litigation." 111 U.S. at 786, 4 S.Ct. at 686.

Appendix C

The purpose of the rule disallowing interest accruing after insolvency is to lend support to the concept of ratable distribution: that ratable distribution should be made to the creditors on the basis of what was due to them at the time of the insolvency. However, a difference must be recognized between the case where interest accruing after insolvency is added to become a part of the claim itself and the case where interest is awarded in addition to the amount of the claim for failure of the receiver to pay the claim when it became due or to include the claim in a distribution in which it was entitled ratably to share.

Noting this distinction, the Court in *Armstrong v. American Exchange Nat'l Bank,* 133 U.S. 433, 470, 10 S.Ct. 450, 33 L.Ed. 747 (1890), allowed interest on a claim from the date on which the distribution to the claimant should have been made. Similarly, in *Ticonic Nat'l Bank v. Sprague,* 303 U.S. 406, 58 S.Ct. 612, 82 L.Ed. 926 (1938), the Court held that:

> "It is true that in the liquidation of national banks, dividends from the general funds on unsecured claims are made pro rata upon the amount of each claim as of the date of the insolvency * * * It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. *But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors.*"

303 U.S. at 411, 58 S.Ct. at 614 (emphasis supplied).

To be accorded the required equal treatment among creditors, appellants were entitled to a ratable dividend of 100 percent of the value of each letter of credit on the date

each letter matured. Because such a ratable distribution was not made, appellants are entitled to recover the interest accruing on each letter from the date of its maturity, the dates on which the distribution would have been made had all the claims been ratably treated. *Ticonic Nat'l Bank v. Sprague, supra,* 303 U.S. at 411, 58 S.Ct. 612.

JUDGMENT

On the cross appeal of the FDIC, the judgment of the district court holding appellants' letters of credit to be provable claims in face amount is affirmed.

On the appeal of First Empire Bank and Societe Generale, the judgment of the district court is reversed and the case is remanded with instructions that judgment be entered in favor of each appellant in the amount of the face value of each USNB letter of credit held by it, plus interest from the dates of maturity, less the amount of any USNB deposit held by it.

Appendix D—Order and Second Amended Judgment dated 3/19/79

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MAR 19 1979

Clerk, U.S. District Court
SOUTHERN DISTRICT OF CALIFORNIA
By J. Hatch Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

No. 74-468-N

FIRST EMPIRE BANK—NEW YORK, et al.,

Plaintiffs,

v.

FFDERAL DEPOSIT INSURANCE CORPORATION, et al.,

Defendants.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of United States National Bank,

Counterclaimant,

v.

FIRST EMPIRE BANK—NEW YORK and SOCIETE GENERALE,

Counterdefendants.

Appendix D

Order and Second Amended Judgment

The above-entitled cause came on for trial between November 30 and December 17, 1976. Plaintiff and counterclaim defendant First Empire Bank—New York ("FEB"), by its successor-in-interest Manufacturers & Traders Trust Co. of Buffalo, New York ("M & T"), appeared by Gary J. Greenberg, Esq., of Stroock & Stroock & Lavan; plaintiff and counterclaim defendant Societe Generale ("Sogen") appeared by Don A. Proudfoot, Jr., Esq., of Graham & James; defendants and counter-claimants Federal Deposit Insurance Corporation ("FDIC"), and Federal Deposit Insurance Corporation, as receiver of United States National Bank ("Receiver"), appeared by Charles A. Legge and Wilkes R. Morgan, Esqs., of Bronson, Bronson & McKinnon, and Richard R. Gore, Esq. of Schall, Boudreau & Gore. On March 18, 1977, the Court entered its Findings of Fact and Conclusions of Law, together with a Judgment. On April 25, 1977, an Amended Judgment was entered by the Court. Both plaintiffs and defendants prosecuted appeals from the Amended Judgment to the United States Court of Appeals for the Ninth Circuit. On April 6, 1978, that Court entered its opinion and decision affirming in part and reversing in part the Amended Judgment. FDIC filed a Petition for a Writ of Certiorari with the United States Supreme Court asking that Court to review, in part, the Ninth Circuit's determination. On October 16, 1978, the Supreme Court denied the Petition. On October 24, 1978, the mandate of the Ninth Circuit issued to this Court and was duly spread upon the record on December 11, 1978.

On November 21, 1978, plaintiffs moved the Court for entry of judgment. On December 7, 1978, defendants filed objections to plaintiffs' proposed judgment. Plaintiffs' motion to enter judgment and FDIC's objections thereto came on for hearing before the Court on February 5, 1979. FEB and M & T appeared by Gary J. Greenberg,

Esqs., of Stroock & Stroock & Lavan, Sogen appeared by Don A. Proudfoot, Jr., Esq., of Graham & James; and FDIC and Receiver appeared by Charles A. Legge and Wilkes R. Morgan, Esqs., of Bronson, Bronson & McKinnon.

After considering the opinion and decision of the Ninth Circuit Court of Appeals, the briefs and affidavits in support of and in opposition to plaintiffs' motion and defendants' objections, and the oral argument of counsel, and upon due deliberation, the Court makes the following Orders on Plaintiffs' Motion and Defendants' Objections:

(a) Plaintiffs are entitled to post-maturity interest on each letter of credit at the California legal rate of seven percent (7%) and not at the rates provided for in the letters of credits and related agreements described below;

(b) Plaintiffs' offsets of United States National Bank ("USNB") deposits held by them on the date of USNB's insolvency should be credited against the USNB letters of credit held by plaintiffs bearing the earliest maturity dates, with such offsets to be credited effective October 19, 1973;

(c) Post Maturity interest should be computed based on a 365-day accounting year; and

(d) Plaintiffs are entitled to their taxable costs in this Court.

NOW THEREFORE, the Court enters Judgment as follows:

1. Judgment be and it hereby is entered in favor of plaintiffs FEB, M & T and Sogen and against the Receiver adjudicating that FEB, M & T and Sogen have proved according to law that they are entitled to be recognized as claimants of Receiver and to receive Receiver's certificates as follows:

(a) Claims re letters of credit Nos. 70-515 and 70-612 in favor of FEB and M & T in the face amount

thereof, plus interest at the contract rates to dates of maturity, and legal interest thereafter, less offsets; and

(b) Claims re letters of credit Nos. 70-639, 70-677 and 70-620 in favor of Sogen, in the face amount thereof, plus interest at the contract rates to maturity and legal interest thereafter, less payments received and offsets.

2. Judgment be and it hereby is entered in favor of FDIC and Receiver and against plaintiffs FEB and M & T and Sogen on plaintiffs' second amended complaint to the extent plaintiffs sought declarations that their claims constituted inter-bank loans or deposits which should have been transferred to Crocker National Bank on October 18, 1973.

3. Judgment be and it is hereby entered in favor of FEB, M & T and Sogen to the extent that the manner in which the FDIC and the Receiver have acted with respect to plaintiffs' claims is unlawful, in that they have distinguished between plaintiffs' claims and those of other general creditors of USNB and have preferred other General Creditors over Plaintiffs in violation of the ratable dividend requirement of 12 U.S.C. § 194.

4. The Clerk of the Court shall enter judgment in favor of FEB and M & T against FDIC and the Receiver in the amount of $5,529,165.78 and in favor of Sogen and against FDIC and Receiver in the amount of $6,488,712.45.

5. Judgment be and it hereby is entered in favor of FEB, M & T and Sogen and against the Receiver on its counter-claims and each count thereof.

6. IT IS FURTHER ORDERED that:

(a) FEB and M & T shall: Deliver USNB letter of credit No. 70-515 to the Receiver; transfer and assign to the Receiver all of their right, title and interest in and to a certain note of Westward Realty Co. ("Westward"), No. 93 due August 14, 1974, in the face amount of $2,000,000; deliver to the Receiver all documentation concerning collections from the account party; and perform any and all acts reasonably required by the Receiver in connection with transferring and assigning FEB's and M & T's claim in the bankruptcy proceedings of Westward to the Receiver:

(b) FEB and M & T shall: Deliver USNB letter of credit No. 70-612 to the Receiver, transfer and assign to the Receiver all of its right, title and interest in and to a certain note of the Los Altos Management Co., due March 7, 1974, in the face amount of $2,000,000; deliver to the Receiver all documentation concerning collections from the account party; and perform any and all acts reasonably required by the Receiver in connection with transferring and assigning FEB's and M & T's claim in the bankruptcy proceedings of Los Altos Management Co. to the Receiver;

(c) Sogen shall: Deliver USNB letter of credit No. 70-639 to the Receiver; transfer and assign to the Receiver all of its right, title and interest in and to a certain note of Westward, No. 109, due May 3, 1974, in the face amount of $1,000,000; deliver to the Receiver all documentation concerning collections from the account party, security presently or previously held for the indebtedness, and all other documents concerning dealings with the account party; and shall perform any and all acts reasonably required by the Receiver in connection with transferring and assigning Sogen's claim in the bankruptcy proceedings of Westward to the Receiver;

(d) Sogen shall: Deliver USNB letter of credit No. 70-677 to the Receiver; transfer and assign to the Receiver

all of its right, title and interest in and to a certain note of Tri-County Ranches, Inc., No. 100 due July 20, 1974, in the face amount of $3,500,000; deliver to the Receiver all documentation concerning collections from the account party, security presently or previously held for the indebtedness, and all other documents concerning dealings with the account party; and perform any and all acts reasonably required by the Receiver in connection with transferring and assigning Sogen's claim in the bankruptcy proceedings of Tri-County Ranches, Inc., to the Receiver;

(e) Sogen shall: Deliver USNB letter of credit No. 70-620 to the Receiver; transfer and assign to the Receiver all of its right, title and interest in and to a certain note of Roberts Farms, Inc., No. 39, due April 21, 1976, in the face amount of $3,000,000; deliver to the Receiver all documentation concerning collections from the account party, security presently or previously held for the indebtedness, and all other documents concerning dealings with the account party; and perform any and all acts reasonably required by the Receiver in connection with transferring and assigning Sogen's claim in the bankruptcy proceedings of Roberts Farms, Inc., to the Receiver;

(f) Sogen shall perform any and all acts required by the Receiver in connection with transferring and assigning to the Receiver all of its right, title and interest in and to that certain deed of trust dated May 1, 1973, between Cuyamaca Land Company, Trustor, United States Holding Company, Trustee, and Westward Realty Co., Beneficiary; and

(g) FEB, M & T and Sogen shall execute and deliver to Receiver and FDIC all documents not set forth in subparagraphs (a)—(f) above which Receiver or FDIC may reasonably require for the purpose of enabling them to

pursue claims against others on the letter of credit transactions which were the subject of this action.

7. Receiver paid $5,518,994.83 to FEB and M & T and $6,439,396.18 to Sogen on December 11, 1978. Accordingly, a balance of $10,170.95 is due to FEB and M & T and $49,316.27 to Sogen, together with interest at the rate of seven per cent per annum from December 11, 1978 to the date of payment pursuant to the stipulation of the parties and order filed on December 14, 1978. Satisfaction of judgment may be entered upon payment of the additional sums described in this paragraph and costs as inserted by the clerk in paragraph 8 in accordance with Local Rule 15 of this Court.

8. Judgment be and it hereby is entered in favor of plaintiffs FEB, M & T and Sogen and against FDIC in the sum of $9,002.27 for costs of suit in this Court.

Dated: March 16, 1979.

LELAND C. NIELSEN
United States District Court

Approved as to Form:

STROOCK & STROOCK & LAVAN
GRAHAM & JAMES

By EDWARD J. ECKERT
Eward J. Eckert, Esq.
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